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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Professional Landscape Management Services, Inc.--Costs

File: B-287728.2

Date: November 2, 2001

Joel S. Rubinstein, Esq., Bell, Boyd & Lloyd, for the protester.
J.J. Cox, Esq., and Madeline Shay, Esq., U.S. Army Corps of Engineers; and Kenneth Dodds, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies.
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office recommends that the protester be reimbursed the costs of filing and pursuing its protest where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest; protest is clearly meritorious when a reasonable agency inquiry into the protester's allegations would have revealed that the agency had not taken reasonable steps to determine whether the procurement needed to be set aside for HUBZone small businesses.

DECISION

Professional Landscape Management Services, Inc. (PLMS) requests reimbursement of the reasonable costs of filing and pursuing its protest of the Army Corps of Engineers' determination to issue request for proposals (RFP) No. DACW31-01-R-0018 as a small business set-aside, rather than setting the procurement aside exclusively for small businesses certified under the Historically Underutilized Business Zone (HUBZone) program.

We recommend that the Corps reimburse PLMS its protest costs.

BACKGROUND

On February 22, 2001, the Corps's Baltimore district office received a standard form requesting that it issue a "best value" solicitation package for grounds maintenance services for the Washington Aqueduct Division. On March 3, the requirement was

synopsized as a small business set aside on CBDNet, the Commerce Business Daily website, and was described as grounds maintenance services including, among other things, the removal of ice and snow. Agency Report (AR), Tab 5, CBDNet Notice. The RFP, when issued, defined snow removal as an emergency priority requiring the contractor to respond within 2 hours of notification. The RFP did not include any geographic restriction, or otherwise require offerors to be located within a particular area. RFP § C.2.36.1.

The agency report stated that, before the solicitation was issued, the Corps's contracting staff considered various set-aside options. In light of the requirement at Federal Acquisition Regulation § 19.1305(a) and (b), that contracting agencies set aside for HUBZone small businesses all procurements exceeding $100,000 if there is a reasonable expectation of receiving offers from at least two HUBZone small businesses at a fair market price, a Corps official identified as the Deputy for Small Business researched whether there were any qualified HUBZone firms available to perform this work, using the Procurement Marketing and Access Network ("Pro-Net"), an Internet-based, searchable database that the Small Business Administration (SBA) maintains.[1] Although no contemporaneous record of the search was maintained, this official reported that she limited her search to HUBZones in the Washington, D.C. area (including parts of Maryland and Virginia), based on her "business judgment" that grounds maintenance and snow removal fit into the category where it is essential to use local firms. Hearing Video Transcript (VT) at 10:52.[2] The search identified no local HUBZone small businesses. VT at 9:53. This official subsequently admitted that when she conducted the search, she entered an improper code (called a "NAICS" code, based on the North American Industry Classification System)[3] to specify the type of services being sought. VT at 10:39. She stated that it was her understanding at that time that a 5-digit code would yield more inclusive results, whereas in fact, only a 6-digit code would yield any results in this

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[1] Pro-Net can be accessed through a hyperlink on the SBA website, www.sba.gov.

[2] It is unclear from the record exactly what information the official had available to her when she was formulating her recommendation of whether the procurement should be restricted. While she testified at the hearing that at that time she had only the original request form, which did not include snow removal, VT at 10:50, she repeatedly indicated at the hearing that her concern about snow removal work was an important aspect of her decision to limit her search to local firms. VT at 9:49, 10:55.

[3] The NAICS code replaced the Standard Industrial Classification System as of October 1, 2000, and is used by the federal government to identify and classify specific categories of business activity that represent the lines of business a firm conducts. See http://pro-net.sba.gov.

type of search.[4] Based on her belief that only local firms could reasonably be expected to submit offers, and her belief that no HUBZone-certified firms capable of doing the work were available, the official recommended that the solicitation be issued as a small business set aside, and the contracting officer concurred. VT at 10:56.

After the CBDNet notice appeared, PLMS contacted an SBA representative to inquire whether the procurement could be set aside for HUBZone small business concerns. The inquiry was conveyed to the SBA Liaison Procurement Center Representative (PCR), who then contacted the Corps. According to the Corps's Deputy for Small Business, she told the PCR about the results of the Pro-Net search without discussing the parameters of the search, and told the PCR that the procurement was being set aside for small business concerns. She also advised the PCR that:

> I currently . . . had two . . . [HUBZone] requirements on the street, and as a result of those two procurements, I would meet the [Corps's] imposed goal and the statutory goal as well. I also indicated to [the PCR] that it was possible that I would not meet my small business set-aside goal and that this procurement would assist in that endeavor.

AR, Tab 3, Memorandum at 1.

The Corps official states that the PCR did not object to the Corps's decision. VT at 10:16-10:22. The record includes a contemporaneous document in which the PCR states that, based on the Deputy's indication that her Pro-Net search had not been "successful," he had no reason to object to the decision not to set aside the procurement for HUBZone small businesses. AR, Tab 12, E-mail from PCR to Corps, May 21, 2001.

The RFP was issued on April 13 as a small business set-aside, with a May 16 deadline for receipt of proposals. PLMS filed its protest in our Office on May 10, alleging that the agency's decision not to set the procurement aside for HUBZone small businesses was improper. PLMS asserted that there were at least two such firms on a list of HUBZone firms maintained online by SBA, so that the agency should have expected that two or more qualified HUBZone-certified contractors would submit offers.

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[4] At the time this protest was being developed, our research showed that entering a 5-digit number (such as 56173) on Pro-Net as the NAICS code resulted in a message that "where the firm is HUBZone certified and the firm has NAICS code 56173 . . . [n]o firms meet your search criteria, sorry." Currently, Pro-Net will accept a 5-digit number and produce results based on any NAICS code beginning with those 5 digits. Specifically, entering 56173 results in a list of 120 firms.

The agency submitted its report to our Office on June 8, urging that we deny the protest on the basis that the Corps's set-aside determination was reasonable. The protester submitted its comments on June 21, asserting that when the agency determined that it could not reasonably expect to receive at least two HUBZone-certified small business offers, it had improperly limited its search by geographic area, even though the RFP contained no geographic restriction. On June 27, the Corps filed a rebuttal to the protester's comments. The Corps argued that it was entitled to rely on the results of its ProNet search at the time it made its set-aside determination (as opposed to being obligated to take into consideration search results later submitted by the protester, or information regarding the actual offers that were submitted). The Corps also defended its decision to consider only firms in the Washington area in determining whether to set the procurement aside for HUBZone small businesses.

On July 3, our Office informed the parties by a telephone conference call that we intended to hold a hearing for the purpose of obtaining testimony from the agency contracting officials concerning their basis for not setting aside this procurement for HUBZone-certified firms. The hearing was held in our Office on July 12. Because of the important role that SBA plays in HUBZone matters, our Office invited SBA representatives to participate in the hearing and to submit post-hearing comments with SBA's views, and they did so.

On July 17, approximately 5 weeks after the agency filed its protest report, the Corps informed us that it intended to take corrective action. The Corps advised that it was not until discussions with witnesses and others the evening before the hearing that the Corps first discovered that the initial Pro-Net searches had used a flawed NAICS code. The Corps stated that searches had been conducted the same day for both HUBZone-certified firms and firms certified under Section 8(a) of the Small Business Act[5], using the same flawed 5-digit number as the NAICS code, and that this flaw in the search entry was the apparent reason that the initial searches did not locate any firms. Agency Letter of July 17 at 1. The Corps proposed to cancel the solicitation, "reinstitute" the entire set-aside decision process including separate reviews for availability of 8(a) and HUBZone firms, and resolicit the requirements. Id. The following day, PLMS filed this request for reimbursement of costs.

DISCUSSION

Our Bid Protest Regulations provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including

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[5] Section 8(a) establishes a business development program under which, among other things, competition may be restricted to eligible small disadvantaged business concerns. See generally 15 U.S.C. § 637(a); 13 C.F.R. Part 124.

reasonable attorneys' fees. 4 C.F.R. § 21.8(e) (2001). We will make such a recommendation where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, B-243785.2, June 10, 1991, 91-1 CPD ¶ 558 at 2. A protest is clearly meritorious when a reasonable agency inquiry into the protester's allegations would show facts disclosing the absence of a defensible legal position. The Real Estate Ctr.--Costs, B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105 at 3. Our rule is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. David Weisberg--Entitlement to Costs, B-246041.2, Aug. 10, 1992, 92-2 CPD ¶ 91 at 4.

The Corps opposes PLMS's request, arguing that corrective action was taken "promptly" because it was taken before the record was closed; that the basis for its corrective action is different from PLMS's basis for protest; and that the protest was not "clearly meritorious" in any event, since it presented a "matter of first impression." The Corps continues to "dispute the allegation that restricting competition only to HUBZone firms was necessary, for all the reasons explained" during the course of the protest. Agency Response to Request for Reimbursement at 4.

We find the agency's position without merit. With regard to the Corps's assertion that the corrective action was taken promptly because it happened before the record was closed (meaning, presumably, before all post-hearing briefs had been received), we point out that one of the reasons we found that a hearing was necessary in this case was because the agency report failed to disclose the parameters of the Pro-Net search it had conducted. In our view, it is clear that a reasonable agency inquiry would have disclosed the problem with that search weeks earlier.[6] In these circumstances, we do not view the agency's decision to take corrective action as prompt.

Regarding the other prong of our analysis, we find that the protest was clearly meritorious. While the Corps contends that the protest could not be clearly meritorious because it was one of first impression, we disagree. In our view, the protest here is directly analogous to an allegation that a procurement should be set aside for exclusive small business participation. It is well settled that an assessment

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[6] We find particularly troubling that, by the agency's own account, it discovered the flawed search methodology when it questioned its witnesses prior to the hearing, yet it nonetheless allowed the protester and SBA to incur the cost of participating in the hearing and preparing post-hearing comments; the agency gave no indication of its intent to take corrective action until the deadline for submitting its post-hearing comments.

not to set a procurement aside must be based on sufficient facts to establish its reasonableness. Safety Storage, Inc., B-280851, Oct. 29, 1998, 98-2 CPD ¶ 102 at 3; McGhee Constr., Inc., B-249235, Nov. 3, 1992, 92-2 CPD ¶ 318 at 3. Whether the set-aside at issue is one for small businesses or one for HUBZone small businesses, the same test of reasonableness would apply; in that sense, this was not a case of first impression. Indeed, the agency apparently shared that view during the pendency of the protest, since it repeatedly advocated a "reasonable basis" standard, and its submissions to our Office cited our decisions concerning small business set-asides. Corps's June 8 Submission at 3-4; June 27 Submission at 3.

The question, then, is whether, at the time it made its determination, the Corps had a reasonable basis for determining not to set the procurement aside. The protester argued throughout that the Corps had no reasonable basis for its action, based on the protester's assertion that there were at least two HUBZone small businesses that would bid on the work. After the Corps revealed in its report that when it was investigating the likelihood that it would receive two or more HUBZone small business offers, it considered only firms within a certain geographic area (the Washington area), PLMS's comments pursued that aspect of the Corps's set-aside determination. In its post-hearing comments, SBA stated that "[g]enerally, we do not believe that searches in PRO-Net that are limited geographically for [the] purpose of making set aside determinations are reasonable." SBA Post-Hearing Comments at 1. Once the Corps admitted after the hearing that its original Pro-Net search had been flawed (in inputting only five digits), the question of the geographic limitation became irrelevant to our review, since even a nationwide search with only five digits would also have identified no HUBZone-certified small businesses.

While the Corps attaches importance to the difference between the defect in the set-aside analysis alleged in the initial protest and the defect that the agency concedes occurred, we do not view the difference as dispositive in the context of a cost claim. Although PLMS admittedly had not identified in its initial protest the particular error that the agency committed (that is, entering five digits instead of six into the online search engine), we do not view that as a basis to deny its request for costs, since the agency concedes that error in its analysis, and we view that flaw as inextricably bound up with the protester's concern.

Finally, we turn to the agency's argument that its improper Pro-Net search did not prejudice PLMS, since the agency otherwise had a reasonable basis to decide not to set the procurement aside, on the basis of the geographic limitation and its concern about the capability and capacity of HUBZone-certified small businesses. In determining whether an agency's improper action prejudiced a protester, we look to whether, but for the agency's action, the protester would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Where there is an objective, fact-based argument for finding that an agency's improper action did not prejudice a protester, it may well prevail; the more the argument reflects a new judgment on the agency's part, the greater will be our

concern that a judgment forged in the heat of litigation may not reflect the fair and considered judgment of the agency. See Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

Here, the Corps stated, in its corrective action letter, that the "entire set-aside decision process will be reinstituted, including separate availability of 8(a) and HUBZone firms." Agency Letter of July 17 at 1. That full review provided the Corps an opportunity to consider the facts that it learned during the pendency of the protest, and to take into account SBA's views concerning the appropriate parameters of the search.[7] As of the date it committed to reinstituting the entire set-aside decision process, the agency had not yet formed a firm judgment and was thus apparently open to the possibility of setting the procurement aside for HUBZone small businesses. Because, once the agency's admitted error was put aside and the matter revisited, there was a reasonable possibility that the agency would decide to set the procurement aside for HUBZone-certified businesses, we believe that PLMS has shown prejudice, regardless of whether the Corps's ultimate judgment is in favor or against a HUBZone set-aside.

We therefore recommend that the agency reimburse PLMS its costs of filing and pursuing the protest, including reasonable attorneys' fees. See The Real Estate Ctr.--Costs, supra, at 5. The protester should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel

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[7] The agency appears to place considerable weight on the fact that SBA concurred in the decision not to set the procurement aside. It is clear from the record that SBA's initial concurrence was made in reliance on the assumption that the Corps's search was reasonably conducted. The Corps now concedes that the initial search was flawed. Therefore, we think SBA's initial concurrence, based on flawed information, is immaterial.